BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAMON D. GONZALES Claimant VS. **HILAND DAIRY COMPANY** Respondent AND **TRAVELERS INDEMNITY CO. OF AMERICA** Insurance Carrier	)	Docket No. 1,062,244

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the October 23, 2012, preliminary hearing Order entered by Administrative Law Judge John D. Clark. Lawrence M. Gurney, of Wichita, Kansas, appeared for claimant. Douglas C. Hobbs, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant sustained an injury that arose out of and in the course of his employment on July 3, 2012. Respondent was ordered to pay claimant's resulting medical bills as well as temporary total disability benefits from July 19, 2012, until September 2, 2012.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 23, 2012, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

In its Application for Appeal, respondent raised only the issue of notice. But in its brief to the Board, respondent also asserts claimant did not prove he sustained an injury that arose out of and in the course of his employment on July 3, 2012. In the event the Board finds claimant did sustain an injury out of and in the course of his employment,

respondent contends claimant failed to provide it with proper notice of his injury. Respondent also argues claimant failed to produce sufficient proof that his work was the prevailing factor causing him to develop a hernia.

Claimant argues the evidence in the record shows there is a relationship between his lifting at work and the hernia and that his work activities were the prevailing factor in causing his hernia. Claimant also asserts he gave respondent timely and proper notice of his injury.

The issues for the Board's review are:

(1) Did claimant sustain an injury by accident that arose out of and in the course of his employment?

(2) Were claimant's work activities the prevailing factor in the development of claimant's hernia?

(3) Did claimant give respondent proper notice of his injury?

FINDINGS OF FACT

Claimant works for respondent as a stacker. His job requires him to pull crates of milk off a six foot high track and either stack or drag them from eight to fifteen feet. A crate of milk weighs about 35 pounds, and the crates are stacked seven high. The stack can weigh 200 pounds or more. When working, claimant is constantly bending and lifting.

On July 3, 2012, claimant developed discomfort that included frequent urination and a burning sensation, so, on his own, he went to the emergency room. There he was told he could have kidney stones or a urinary tract infection. He was given antibiotics. Claimant reported to respondent's representative, Michelle Cadena, that he could have kidney stones. Claimant missed only one day of work, the day he went to the emergency room. He said the medication helped for a couple of weeks.

On July 17, 2012, claimant had a recurrence of the pain, burning and frequency of urination. Claimant went back to the emergency room, where he was given a CAT scan. The scan revealed he had a small hernia. Claimant said he and the emergency room doctor discussed claimant's work duties but did not discuss what might have caused the hernia. After claimant left the emergency room, he spoke with Ms. Cadena by telephone and told her he had a hernia. He then went in to Ms. Cadena's office, where he met with her, his foreman and his supervisor. Claimant said he had only worked for respondent a little over 90 days and felt intimidated. He was afraid to lose his job because he had been told not to report anything under workers compensation. Also, he did not know what a hernia was at that time. Claimant testified that Ms. Cadena told him that a hernia is caused by having sex, straining too hard, or by sneezing or coughing. Ms. Cadena had hired

claimant and knew what his job duties were. Claimant did not tell them he thought his hernia was related to his work. He acknowledged that during this meeting, he was adamant that he did not want to file a workers compensation claim for his hernia.

Claimant was scheduled for surgery, and he first visited with his surgeon on July 19, 2012. Claimant testified the surgeon said there was no doubt the hernia had been caused at work. Claimant testified he informed Ms. Cadena right away that the surgeon had attributed the hernia to his work activities.

Claimant had a preemployment physical and did not have a hernia at that time. He does not perform any lifting or physically demanding tasks outside of work.

Claimant was taken off work on July 19, 2012, and was allowed to return on September 2, 2012. He admits he first reported this incident as a workers compensation claim on August 9, 2012. On that day, he called respondent and said he changed his mind and wanted to turn his hernia condition in as being work related. Ms. Cadena was out of town that day. On August 13, when Ms. Cadena returned, he filed an accident report claiming a date of accident of July 3, 2012. On September 7, 2012, claimant filed a Form K-WC E-1 Application for Hearing alleging an accident date of "on or about July 3, 2012." This was repeated at the preliminary hearing.

Although the record contains medical and hospital reports relating to claimant's hernia, there is no medical expert opinion or statement in the record concerning causation or the prevailing factor of claimant's condition.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-508 states in part:

> (d) ''Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. ''Accident'' shall in no case be construed to include repetitive trauma in any form.
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> . . . .
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> (f)(1) ''Personal injury'' and ''injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
>
> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates,

accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words ''arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(g) ''Prevailing'' as it relates to the term ''factor'' means the primary factor, in relation to any other factor. In determining what constitutes the ''prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) ''Burden of proof'' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-510d(b) states in part:

If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . . .

(22) For traumatic hernia, compensation shall be limited to the compensation under K.S.A. 44-510h and 44-510i, and amendments thereto, compensation for temporary total disability during such period of time as such employee is actually unable to work on account of such hernia . . . .

K.S.A. 2011 Supp. 44-520 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
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> (C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.
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> Notice may be given orally or in writing.
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> (2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.
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> (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
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> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
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> (b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
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> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[1] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[2]

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[1] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[2] K.S.A. 2011 Supp. 44-555c(k).

ANALYSIS

Claimant's job with respondent is called a stacker. He pulls the crates of milk off a conveyor track, drags them 8 to 15 feet, and stacks them six or seven high. The crates each contain 9 gallons or 1/2 gallons of milk. Each crate weighs about 35 pounds, and claimant's job requires constant bending, lifting, pushing and pulling. Claimant's testimony concerning how and when his symptoms appeared is uncontroverted. Uncontroverted evidence is accepted unless it is somehow not believable or credible. The ALJ apparently found claimant's testimony credible, and this Board Member agrees. Claimant has met his burden of proving he suffered personal injury by accident arising out of and in the course of his employment and that work was the prevailing factor causing the injury.

The ALJ did not address the issue of notice in his October 23, 2012, Order or he impliedly found timely notice because he awarded compensation, temporary total disability and medical benefits. In the interests of judicial economy, this Board Member will not remand this matter to the ALJ for a determination on the issue of timely notice but will instead treat the ALJ's Order as containing an implicit finding that timely notice was given by claimant to respondent.

Claimant first noticed the symptoms in his abdomen and when urinating on July 3, 2012. He went to the doctor but was told it was probably kidney stones or a urinary infection. He was given antibiotics. On July 17, the symptoms returned. This time, claimant was diagnosed with a hernia. Claimant was not advised the hernia could be work related until July 19, 2012. Claimant relayed this diagnosis to his supervisor, Ms. Cadena, on that date. Claimant said he also told Ms. Cadena that his condition was work related. But claimant later agreed on cross-examination that it was not until August 9, 2012, that he reported the hernia was work related.

> Q. [by claimant's attorney] When you were scheduled to have surgery, did you visit with the surgeon about the anticipated surgery?
> A. [by claimant] Yes.
> Q. And did he, at least to your understanding, draw a connection between that and what you do at work?
> A. He said no doubt about it the hernia you got it at work.
> Q. Did you relate that to Miss Cadena or Hiland Dairy?
> A. Yes.
> Q. When did you do that?
> A. Right after I got back from the surgeon.[3]

> Q. [by respondent's attorney] You first reported this incident as worker's compensation to [*sic*] on August 9, 2012, is that correct?

[3] P.H. Trans. at 14-15.

A. [by claimant] I think so.[4]

In determining whether notice was timely, it first must be determined what is the date of accident or the date of the repetitive trauma. In this case, July 3, 2012, is the only date claimed as the accident date, even though it appears there was a subsequent injury, aggravation, worsening or recurrence of the hernia symptoms from the work activities. Claimant has 20 days from the date he sought medical treatment for an injury by accident. Claimant first sought treatment for his symptoms on July 3, 2012. Clearly, August 9 is more than 20 days from July 3, 2012. But claimant argues that on July 3, 2012, he did not know his symptoms were due to an injury by accident. He first learned his hernia was an injury due to an accident on July 19, 2012. Twenty days from that date is August 8, 2012. The statute provides that notice must be the earliest of the prescribed dates, and another provision requires notice within 30 days from the date of accident. In this case, 30 days from the accident date alleged, July 3, 2012, is August 2, 2012. Consequently, under either provision, the notice claimant gave on August 9, 2012, was not timely. Conversely, if claimant gave notice on July 19, 2012, then, under either provision, it would be timely.

This case presents a close question on whether claimant gave his employer timely notice. Claimant testified on direct examination that he gave Ms. Cadena notice of a work-related hernia on July 19, 2012. But claimant subsequently admitted on cross-examination that he first reported the condition as work related on August 9, 2012. Furthermore, claimant completed paperwork for FMLA leave for his surgery and did not complete an accident report until August 13, 2012. Nevertheless, claimant testified in no uncertain terms that he told Ms. Cadena his hernia was work-related on July 19, 2012. Claimant was less certain in his response to the question of whether August 9, 2012, was the first date he reported his hernia was work related. In addition, Ms. Cadena was present at the preliminary hearing but was not called to give testimony. If Ms. Cadena disagreed with claimant's testimony that he told her on July 19, 2012, that his hernia was work related, she could have easily taken the stand and said so.

CONCLUSION

Based on the record presented to date, this Board Member finds and concludes: (1) Claimant sustained personal injury by accident arising out of and in the course of his employment on the date alleged, (2) claimant's work activities were the prevailing factor in causing his injury, and (3) claimant gave respondent timely notice of his injury by accident.

[4] *Id.* at 19.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated October 23, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2012.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

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John D. Clark, Administrative Law Judge